



August 28, 2000

Mr. Michael J. Cosentino  
City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR2000-3315

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 138409.

The City of Bryan (the "city") received a request for information relating to customers of Bryan Texas Utilities ("BTU") and to what you describe as being a BTU marketing program. You have submitted representative samples of information that are responsive to item nos. 1 through 7 of the request for information. You claim that the requested information is excepted from disclosure under sections 552.103, 552.104, and 552.131 of the Government Code. You assert that item no. 8 of the request asks a question and does not constitute a request for information under the Act. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup> We also received and have reviewed the requestor's letter of June 30, 2000.

Initially we must address the requestor's contention that the city ignored its previous request for information and failed to seek this ruling in timely compliance with the Act. The requestor asserts that it sent a previous request for information, dated May 26, and that the city ignored that letter. The requestor further states that it sent the same request by certified mail on June 7 and that the June 7 letter resulted in the city's request for this ruling. The requestor provides us with no proof, however, of whether and/or when its May 26 letter actually was mailed. In requesting this ruling, you state that the city received the requestor's

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<sup>1</sup>This letter ruling assumes that the representative sample of responsive information that you submitted is truly representative of the requested information as a whole. This letter ruling does not reach, and therefore does not authorize you to withhold, any other requested information that is substantially different from the information that was submitted. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

letter of June 7 on June 8. The city requested this ruling by letter dated and mailed on June 21. Whether the requestor's letter dated May 26 was actually sent and received presents questions of fact. This office cannot resolve disputes of fact in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Therefore, we conclude that as the city requested this ruling within ten business days of the date of its receipt of the requestor's June 7 letter, the city's request for this ruling was submitted in timely compliance with section 552.301(b) of the Act.<sup>2</sup>

Next we will respond to your argument that item no. 8 of the requestor's June 7 letter is a question that does not constitute a request for information under the Act. The Act does not require a governmental body to perform legal research for a requestor or to answer general questions. *See* Open Records Decision No. 563 at 8 (1990). However, the Act does require a governmental body to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8 (1990). In this instance, the requestor seeks "the name, address, and telephone number of the software company that is used in keeping tract [sic] of the loans and payment records as they are received on the HVAC Loan Contract Program[.]" If the city holds information that is responsive to item no. 8 of the requestor's letter, then that information must be released, unless the information is confidential under some other source of law. *See* Gov't Code §§ 552.006, .301(a); *but see id.* §§ 552.101, .352.

You claim that the other information sought by the requestor is excepted from disclosure under section 552.103 of the Government Code. As amended by the Seventy-sixth Legislature, section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

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<sup>2</sup>Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10<sup>th</sup> business day after the date of receiving the written request [for information]." Gov't Code § 552.301(b).

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documentation sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You inform this office that on the date of the city's receipt of the request for the information that is at issue here, a lawsuit styled *The Air Conditioning Store, Inc. v. The City of Bryan, Texas, et al.*, was pending in the United States District Court for the Southern District of Texas. You have provided a copy of the plaintiff's third amended complaint in that lawsuit and a copy of the court's order granting leave to file that pleading. You represent to us that the information at issue directly relates to the plaintiff's claims in the pending litigation. Based on your representations and our review of the submitted pleadings and representative samples of responsive information, we conclude that the requested information is related to litigation to which the city was a party on the date of the city's receipt of the request for that information. Accordingly, we conclude that the requested information is excepted from disclosure under section 552.103 of the Government Code.

In reaching our conclusion under section 552.103, we assume that the opposing party to the pending litigation has not seen or had access to any of the information that the city seeks to withhold. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to pending litigation previously has seen or has had access to requested information relating to the litigation, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The city must not release any confidential information, however, even at the conclusion of the related litigation. *See* Gov't Code §§ 552.007, .101, .352.

As we are able to make a determination under section 552.103, we need not address your claims under sections 552.104 and 552.131. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

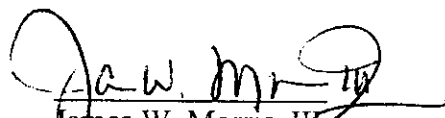
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

  
James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ljp

Ref: ID# 138409

Encl. Submitted documents

cc: Mr. G. W. McKinzie  
The Air Conditioning Store Inc.  
2306 Sandy Lane  
Bryan, Texas 77801-1517  
(w/o enclosures)